UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Ralph Jefferson Young III Z-1226711

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2457

Ralph Jefferson Young III

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR Part 5, Subpart J.

By order of 23 June 1986, and Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's license and merchant mariner's document for four months, remitted on twelve months probation, upon finding proved the charge of negligence. The first specification found proved alleges that Appellant, under the authority of the captioned license, while serving as operator aboard the M/V MARJORIE B. MCALLISTER, on or about 15 November 1985, failed safely to navigate the M/V MARJORIE B. MCALLISTER, its tow, the T/B CIBRO SAVANNAH, and the assist tug M/V WALTON, within the Chelsea River, Boston Harbor, Massachusetts, contributing to the allision of the T/B CIBRO SAVANNAH with the fending system f the Chelsea Street Bridge resulting in damage to the fending system. The second specification found proved alleges that Appellant, while serving as stated above, failed safely to navigate the M/V MAJORIE B. MCALLISTER, contributing to the allision of the T/B CIBRO SAVANNAH with the moored tug LEIGH ANN REINAUER.

Three other specifications alleging negligence were found not proved. They alleged that Appellant failed safely to navigate the flotilla described, contributing to the allision with and damage to Chelsea River Lighted Buoy No. 2 by the tank barge and the assist tug, that Appellant failed safely to navigate the assist tug, and that Appellant failed safely to navigate the flotilla, contributing to the allision of the tank barge with the northeast corner of the East Boston Pumping Station Pier (MDC pier), causing damage to both. Also found not proved was a charge of misconduct, supported by a single specification, which alleged that Appellant wrongfully damaged an Aid to Navigation, the Chelsea River Lighted Buoy No. 2, in violation of

33 U.S.C. 408.

The hearing was held at Boston, Massachusetts, on 25 and 26 February 1986. Appellant was present at the hearing, and was represented by professional counsel. He denied each charge and specification.

The Investigating Officer introduced in evidence the testimony of six witnesses, and also introduced nine exhibits.

Appellant introduce his own testimony, that of one other witness, and six exhibits.

The complete Decision and Order was served on Appellant on 27 June 1986. Appeal was timely filed on 18 July 1986, and was perfected on 9 March 1987.

FINDINGS OF FACT

At all times relevant to these proceedings Appellant was serving as the operator aboard the M/V MARJORIE B. MCALLISTER under the authority of the captioned license.

At the time of the incident, Appellant had served as operator of the MARJORIE B. MCALLISTER for approximately two and one-half years. He had made approximately 300 to 500 trips on the Chelsea River.

MARJORIE B. MCALLISTER is 111.5 feet long and 30.1 feet wide. She is 189 gross and 129 net tons, and has twin screws and rudders with a total shaft horsepower of 4,300.

The assist tug, WALTON, is 81.5 feet long and 28 feet wide, of 181 gross and 123 net tons, with twin screws and rudders. The operator of the WALTON on 15 November 1985 was Captain Richard Stewart. He had approximately twenty-five years experience as a pilot, with some 3,000 trips on the Chelsea river, mostly as a docking pilot; he had only served as operator of an assist tug about twenty times.

The T/B CIBRO SAVANNAH is 400 feet long and 78.1 feet wide, of 8151 gross (and net) tons. She was manned on 15 November 1985 by Charles Wright as Master and John P. Blair as Mate.

On 14 November 1985 Appellant delivered the CIBRO SAVANNAH, loaded with unleaded gasoline, to the Gulf terminal in Chelsea, which

is just north of the Chelsea Street Bridge, on the northwest side of the Chelsea River. The barge was moored starboard side to, heading downstream.

On the morning of 15 November 1985, upon receiving notice that the barge would be ready to sail, Appellant made arrangements with the Boston Towboat Company for an assist tug. Appellant always used an assist tug when taking a barge from the Chelsea River; he usually used a Boston Towboat Company tug. Appellant then proceeded in his tug from the Boston Towboat Company facility, where he had moored overnight, to the pier where the CIBRO SAVANNAH was moored. He was advised by Boston Towboat that the WALTON would be his assist tug.

The weather on 15 November 1985 was good visibility, wind from the northwest at approximately sixteen knots, increasing to approximately thirty knots later in the morning.

When the MARJORIE B. MCALLISTER arrived at the CIBRO SAVANNAH, Appellant made up to tow the barge astern, using both a nine-inch nylon hawser and a towing wire with towing bridle. Both were rigged with an approximate length of fifty feet.

As the tug WALTON approached, Appellant contacted Captain Stewart via VHF radio, and directed him first to come along the port side of the barge, amidships, and push the barge against the dock so that the mooring lines of the barge could be taken in. When the lines were taken in the WALTON was to proceed to the stern of the barge and make up in the notch as assist tug.

When all the mooring lines on the barge were taken in, the WALTON proceeded to the stern as directed, to make up in the notch. Upon observing the width and depth of the notch, the rake of the stern, and the freeboard of the barge, which was light, Captain Stewart concluded that his pilot house would be damaged if he tried to make up in the notch. He informed Appellant of this, and Appellant told him to do the best he could, or words to that effect.

The barge Captain, seeing all lines were in, signaled Appellant that all was ready. The flotilla, approximately 650 feet in length, got underway. The speed of the flotilla throughout the part of the transit in question was three knots.

Captain Stewart made up to the barge by putting lines from the stern bitts of the barge to the forward quarter bitts of the WALTON. The length of the lines was such that the WALTON's bow was about even

with the stern of the barge. It took the WALTON five to eight minutes to make up to the barge; making up was complete about three minutes after towing began.

There was a practice between the MARJORIE B. MCALLISTER and the CIBRO SAVANAH for the captain of the barge to stand on the bow of the barge to signal to the tug, and for the mate to stand on the stern of the barge to signal to the assist tug.

As the flotilla proceeded downstream toward the Chelsea Street Bridge, the stern of the barge and the assist tug were falling off to leeward due to the wind, towards the East Boston (southeast) side of the river. The mate on the barge signaled to Captain Stewart on the WALTON to back to starboard. The WALTON was going slow astern. The stern of the barge and the assist tug were in the vicinity of the Chelsea River Lighted Buoy No. 2 at the time.

After passing Buoy 2, Appellant could see the stern of the barge falling off to port, but he could not see the WALTON. He ordered the WALTON via VHF radio to back down to starboard, but received no reply. The mate on the barge continued to shout and signal to Captain Stewart on the WALTON to back to starboard. Captain Stewart threw up his hands, indicating that there was nothing more he could do.

The CIBRO SAVANNAH struck the pier of the MDC pumping station, holing the barge above the water line in the port quarter.

Continuing down the river, the MARJORIE B. MCALLISTER and the bow of the barge entered the draw of the Chelsea Street Bridge, which had opened for the passage. The barge, continuing to follow at an angle to port, struck and rubbed along the fender on the southeast side of the draw, doing damage to the fender system. The flotilla continued through the draw. Appellant had not received any status report or assistance from the WALTON. Though he could see that the barge was continuing to follow at an angle to port, he made no further attempt to contact the WALTON to determine why she was not holding the stern of the barge up against the wind.

After clearing the bridge, the barge, still following at an angle to port, struck and rubbed the tug LEIGH ANN REINAUER, which was moored at the Mobil dock immediately downstream of the bridge.

After proceeding downriver and through the next bridge without incident, the WALTON was dismissed by Appellant.

There is no indication that either the WALTON or the MARJORIE B. MCALLISTER had any mechanical problems affecting the ability to perform the transit.

BASES OF APPEAL

Appellant bases this appeal on the following contentions:

(1) The conclusion of the Administrative Law Judge that Appellant navigated negligently was "clearly erroneous," because Appellant rebutted the presumption of negligence that arises when a moving vessel allides with a fixed object by showing that the allisions were caused by the fault of a thir party, namely the assist tug WALTON.

(2) Any failure of the appellant was an error in judgment not amounting to negligence.

Appearance: Clinton & Muzyka, P.C., Boston, Massachusetts, by William H. Welte.

OPINION

I

Appellant's principal argument on appeal is that the Administrative Law Judge's determination that Appellant was negligent in the navigation of the tug MARJORIE B. MCALLISTER and her tow was clearly erroneous. I do not agree.

A strong and well-established presumption of negligence by the operator of a moving vessel arises whenever the vessel under his control allides with a fixed object. Appeal Decisions 2402 (POPE), 2380 (HALL), and 2284 (BRAHN). The presumption, once established, can only be rebutted by a showing that the operator used reasonable care under the circumstances. Weyerhauser Co. v. The Atropos Island, 777 F.2d 1344 (9th Cir. 1985); Appeal Decisions 2284 (BRAHN) and 2380 (HALL); see Commandant v. Dougherty, NTSB Order EM-140 (March 2,1987), request for reconsideration filed (Docket No. ME-121); Commandant v. Murphy, NTSB Order EM-139 (March 2, 1987), request for reconsideration filed (Docket No. ME-122). Appellant failed to carry his heavy burden in attempting to rebut the presumption of negligence. He argues that the allisions were caused by the fault of the assist tug WALTON in not backing full to

starboard. While it is clear from the record that the actions of the WALTON were a contributing cause of the allisions, that is of no help to Appellant. The only issue in this case is the negligence of the person charged. Contributory negligence of another party is not a defense. Appeal Decisions 2380 (HALL) and 2175 (RIVERA). The Administrative Law Judge found the presumption unrebutted in this case. I will not disturb the determination of the Administrative Law Judge absent a showing that it is inherently incredible or without support in the record. Appeal Decisions 2356 (FOSTER), 2344 (KOHAJDA), and 2302 (FRAPPIER).

There is adequate support in the record for the determination that Appellant acted negligently. He did not make sure that Captain Stewart on the assist tug WALTON received and understood his orders to back down full to starboard; he did not even insist upon an acknowledgment of any sort. (TR at 231-38). Appellant's tolerance of the WALTON's failure to respond to his commands, and his failure to assert his authority as the pilot of the flotilla contributed to the allisions with the bridge and moored tug.

Appellant cites several cases 1 for the proposition that

1Panama Canal Co. v. Sociedad de Transportes Maritimos, S.A. (The Aurora Borealis), 272 F.2d 726 (5th Cir. 1959); Rawls Bros. Contractors v. United States, 251 F. Supp. 47 (M.D. Fla. 1966); McLain Line, Inc. v. The Archers Hope, 109 F. Supp. 128 (E.D.N.Y. 1952); McGeeney v. East Kingston Brick Co., 1952 AMC 318 (S.D.N.Y. 1951); George D. Perry Scow Corp. v. The Robert H. Smith, 1934 AMC 150 (S.D.N.Y. 1933); Moran Towing & Transportation Co. v. Gulf Refining Co., 1933 AMC 1086 (E.D.N.Y. 1933).

an assist tug can be found independently and solely negligent for its acts or omissions even if its lead tug is not. I do not dispute this contention, but I find it inapposite in this case.

In any event, support can also be found for the proposition that a lead tug and its pilot can be found negligent along with an assist tug. In McGeeney v. East Kingston Brick Co., supra note 1, the assist tug was found negligent for not assisting in keeping the tow in line, but the lead tug was also found negligent for, among other things, failing to ensure that the assist tug was assisting with the tow.

In a relatively recent case with facts remarkably similar to the facts of this case, the pilot of a flotilla was found negligent for failing "to take any steps to ascertain why his orders were not being followed by the [assist tug] . . .." In re Tug Helen B. Moran, Inc., 1979 AMC 563, 574 (S.D.N.Y. 198). In that case, a flotilla made up essentially identically to the flotilla involved in this case was transiting a river. The captain of the lead tug, serving as pilot of the flotilla, stationed himself on the barge in order to be able to see better. When approaching a narrow drawbridge the stern of the barge began to fall off to one side. The assist tug failed to follow the orders of the pilot to back down until it was too late; the barge allided with the bridge. While the assist tug was found negligent for not following the orders of the pilot, the pilot was also found negligent for failing to see that his orders were carried out. Id@. That is exactly the situation in this case.

Appellant also argues that because the Administrative Law Judge found the specification concerning the allision with the MDC pier not proved, the specifications which were found proved should not have been. This argument is based on the short time period in which the allisions with the MDC pier, the Chelsea Street Bridge, and the moored tug LEIGH ANN REINAUER occurred. Essentially, Appellant's contention is that the allisions should all be treated the same, as a sort of continuing occurrence. While the allisions may have been close in time and distance, that does not invalidate the findings of proved to the two specifications found proved. The specifications are independent, and need not have the same disposition. See Appeal Decision 2124 (BARROW).

II

Appellant also contends that any error on his part was a mere error in judment, not negligence. I do not agree.

Negligence is defined for purposes of this case in 46 CFR 5.29 as "the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform." The Administrative Law Judge who heard the evidence in this case found that Appellant acted negligently by failing to establish effective communications with the assist tug WALTON, and failing to exercise effective control over the flotilla. These findings are not without support in the record, and therefore will not be disturbed. Appeal Decisions 2424 (CAVANAUGH), 2356 (FOSTER), and 2344 (KOHAJDA)

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable law and regulations.

ORDER

The decision and order of the Administrative Law Judge dated at New York, New York, on 23 June 1986 is AFFIRMED.

J.C. IRWIN
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 5th day of August 1987.

4. PROOF AND DEFENSES

.16.5 Contributory Fault

not a defense to negligence

.25 Defense

contributory fault not a defense to negligence

.80.5 Negligence

contributory fault not a defense

presumption of, arising from allision

.94 Presumptions

of negligence arising from allision

5. EVIDENCE

.75 Presumptions

of negligence arising from allision

7. NEGLIGENCE

.03 Allision

presumption of negligence arising from

.10 Bridge

allision with

.18 Contributory Fault

not a defense to negligence

.24 Defenses

contributory fault not a defense

.70 Negligence

contributory fault not a defense

presumption of, arising from allision

failure to assert authority as pilot

.80 Presumptions

of negligence arising from allision

10. MASTER, OFFICERS, SEAMEN

.38 Pilot

duty to assert authority over assist tug

11. NAVIGATION

.03 Allision

presumption of negligence arising from

12. ADMINISTRATIVE LAW JUDGES

.50 Findings

upheld unless iherently incredible

upheld unless unsupported

Appeals Cited: 2124, 2175, 2284, 2302, 2344, 2356, 2380, 2395, 2402, 2424

Cases Cited: McGeeney v. East Kingston Brick Co.
Panama Canal Co. v. The Aurora Borealis
Rawls Bros. Contractors v. United States
McLain Line, Inc. v. The Archers Hope
George D. Perry Scow Corp. v. The Robert H. Smith
Moran Towing & Transportation Co. v. Gulf Refining Co.
In re Tug Helen B. Moran, Inc.

Statutes Cited: 33 U.S.C. 408

Regulations Cited: 46 CFR 5.29

***** END OF DECISION NO. 2457 *****